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Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL INTERFAITH CABLE COALITION, INC.
Operating as the VISION INTERFAITH SATELLITE NETWORK and ATLANTA INTERFAITH BROADCASTERS, INC.,

Appellants,

vs.

FEDERAL COMMUNICATIONS COMMISSION, and the UNITED STATES OF AMERICA,

Appellees.

ON APPEAL FROM 3-JUDGE COURT
UNITED STATES DISTRICT COURT DISTRICT OF COLUMBIA

JOINT JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the must-carry provisions of the Cable Act of 1992 violate the Establishment and Free Exercise Clauses of the First Amendment as creating an impermissible government subsidy to religion when local off-air stations which will be required to be carried under the Act will be religious broadcasters disseminating a sectarian message.

2. Whether the must-carry provisions of the Cable Act of 1992 violate the Establishment and Free Exercise Clauses of the First Amendment when the Act will deny equal access to religious cable programmers to the cable medium while mandating the carriage of local religious broadcast stations, where the denial of such

carriage will be by reason of appellants' message.

3. Whether the must-carry provisions of the Cable Act of 1992 violate the Establishment and Free Exercise Clauses of the First Amendment when the Act coerces the private cable operator to carry and disseminate a religious message and may be perceived by the viewing public as an endorsement of such a message.

List of Parties to the Proceeding Below[1]

Appellants

National Interfaith Cable Coalition, Inc.
Atlanta Interfaith Broadcasters, Inc.

Appellees

Association of America's Public Television Stations
Association of Independent Television Stations, Inc.
Community Broadcasters Association
Consumer Federation of America
The Corporation for Public Broadcasting
Sandra Engle
Federal Communications Commission
The International Association of Machinists and Aerospace Workers, AFL-CIO
International Broadcasting Network
The International Television Broadcasting, Inc.
Arts & Entertainment Network
Black Entertainment Television, Inc.
Daniels Cablevision, Inc.
Discovery Communications, Inc.
E! Entertainment Television, Inc.
Hearst/ABC-Viacom Entertainment Services

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1 The three-judge court granted all motions to intervene in this proceeding. Accordingly, the intervenors have been grouped as plaintiffs or defendants as appropriate.

International Family Entertainment, Inc.
The Learning Channel, Inc.
National Cable Satellite Corporation
National Cable Television Association, Inc.
QVC Network
Time Warner Entertainment Company, L.P.
The Travel Channel, Inc.
Turner Broadcasting System, Inc.
USA Networks
Morningstar Communications
National Association of Broadcasters
National Council of Senior Citizens
National Rural Telecommunications Cooperative
Office of Communication of the United Church of Christ
Paging Associates, Inc.
The Public Broadcasting Service
Sherjan Broadcasting Co., Inc.
Triplett & Associates, Inc.
TV 14, Inc.
TV 58 St. Louis, Inc.
United States of America
Zantech, Inc.

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JURISDICTIONAL STATEMENT

Appellants, NATIONAL INTERFAITH CABLE COALITION, INC. ("NICC") operating as the VISION INTERFAITH SATELLITE NETWORK ("VISN") and ATLANTA INTERFAITH BROADCASTERS, INC. ("AIB"),[2] intervenor-plaintiffs

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2 Neither NICC nor AIB has any affiliates, parents or subsidiaries.

below, appeal from the judgment of the three-judge district court[3] upholding the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992, (the "Cable Act")[4] 47 U.S.C. §§ 534 and 535, as not violative of the First Amendment. Appellants NICC and AIB join with the other appellants from the decision below, as identified infra, which are filing a separate jurisdictional statement and which raise issues under the Freedom of Speech and Freedom of the Press Clauses to the First Amendment which are equally applicable

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3 The Notices of Appeal of NICC and AIB are annexed hereto in the Appendix to the Jurisdictional Statement of Appellants at pages A-1 to A-2 and B-1, respectively (hereinafter "J.S. App. _____") filed with this Court.

4 47 U.S.C. §§ 531 et seq.

to NICC and AIB.[5] However, NICC and AIB are unique as religious programmers, and for this reason separately appeal on the grounds that the must-carry provisions violate their rights under the Establishment and Free Exercise Clauses of the First Amendment as well.

OPINION BELOW

The opinion of the three-judge United States District Court for the District of Columbia, is reported at 819 F. Supp. 32. J.S. App. C-1 to E-22.

JURISDICTION

The judgment of the district court was entered on April 12, 1993. Timely

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5 To the extent they are applicable herein, appellants adopt and incorporate the discussion of background facts by the other appellants as to both the cable industry and the history of "must-carry."

Notices of Appeal were filed in the district court and in this Court on May 3, 1993 by appellants NICC and AIB. J.S. App. A-1 to A-2, B-1.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253, which provides that "[e]xcept as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying...an interlocutory or permanent injunction in any civil action....required by any Act of Congress to be heard and determined by a district of three judges." Section 23 of the Cable Act, 47 U.S.C. § 555(c)(1), requires that challenges to sections 4 and 5 of the Act "be heard by a district court of three judges convened pursuant to the provisions of section 2284 of title 28, United States Code."

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The provisions of the Cable Television Consumer Protection and Competition Act of 1992 which are the subject of this appeal are 47 U.S.C. §§534 and 535. J.S. App. F-1 to F-22.

STATEMENT OF CASE

Appellants NICC and AIB were granted leave to intervene in this

action,[6] which was brought by the TURNER BROADCASTING SYSTEM, INC. and consolidated with other cases brought by cable systems and other suppliers of programming forceable systems (the "other appellants") before a three-judge district court seeking to enjoin enforcement of various provisions of the Cable Act, and specifically, the Act's so-called must-carry provisions, 47 U.S.C. §§ 534, 535, mandating that cable systems carry the programming of local broadcast stations.

The other appellants challenged the constitutionality of the statute under the Speech and Press Clauses of the First Amendment. NICC and AIB

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6 NICC and AIB were treated as amicus curiae during the proceedings below, but were granted intervenor status in the final judgment.

intervened to raise the additional claims that the must-carry provisions impermissibly abridged their rights under the First Amendment's Establishment and Free Exercise Clauses. The district court, by a 2-1 vote, upheld the challenged provisions.

THE APPELLANTS NICC AND AIB

NICC, a not-for-profit Maryland-chartered corporation, is a consortium of more than fifty (50) national faith groups, including, *inter alia*, representatives of most Protestant denominations, Catholic, Jewish, Mormon, Unitarian, Mennonite and Eastern Orthodox groups, as well as The Salvation Army, The National Council of Churches, and The Christian Holiness Association. Its diverse member faith groups represent more than 200,000 congregations with over

112,000,000 members throughout the nation.

NICC created a cable television network called VISN which began transmission in September 1988 and which continues to transmit twenty-four hours daily via satellite on a shared-channel basis,[7] delivering a broad-based faith and values programming service nationwide. VISN can only be viewed by subscribers of cable systems that enter into a carriage agreement with VISN, and it competes for carriage with other cable program services, such as CNN, TNT, The

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7 Since October, 1992 VISN has operated pursuant to a channel-sharing agreement with the American Christian Television System ("ACTS"), which is owned by the Southern Baptist Radio and TV Commission. The combined channel, VISN-ACTS, now reaches nearly 20 million households on more than 1,080 cable systems.

Discovery Channel and numerous other cable networks, as well as with off-air broadcast stations. At least three other religious satellite networks seek carriage on cable systems.

VISN is paid fees by cable systems that elect to carry it, and it can only remain competitive with other cable programmers and continue operating if it can obtain carriage on enough cable systems to provide a sufficient revenue base. As distinguished from competing religious stations and networks, VISN (a) refrains from on-air solicitation of funds, (b) strictly forbids proselytizing, and (c) does not attack or criticize other faith groups.

AIB is a small Georgia nonprofit corporation, with four full time employees, that delivers, without charge, interfaith and local public

service programming via microwave to eleven cable television systems in the Atlanta metropolitan area. Its twenty-four hour per day channel reaches 500,000 households. Interfaith programming is submitted by many of the 1,200 Protestant, Catholic, Jewish, and Moslem congregations in Atlanta that are members. Like VISN, AIB does not allow on-air fundraising or criticism of faiths. Typical of its religious offerings are weekly services from local churches. AIB's revenue comes from fees for programming time ranging from $170 to $300 per hour. This compares to a $4,000 per hour charge by a commercial station in Atlanta. Because AIB uses microwave, it is not a "broadcast" station eligible for must-carry status under the Cable Act, nor has it been considered a "public,

educational, or governmental" channel. Unlike broadcast television signals, AIB's microwave signals cannot be received by conventional television sets, except through cable or with special equipment.

FACTUAL BACKGROUND

The Directory of Religious Broadcasting indicates that 350 full power and low power commercial stations carry religious programming on a full or part time basis ("local religious broadcast stations"). As of November 1992, there were 1,144 full power commercial stations and 1,291 low power stations licensed in the United States. The so-called "independent" stations, which are not affiliated with networks, are the most likely beneficiaries of must-carry. Of the 292 independent, full power commercial

stations, 74 present primarily religious programming.

Typical of the local religious broadcast stations are those owned by or affiliated with Trinity Christian Center of Santa Ana, Inc. d/b/a Trinity Broadcasting Network ("TBN"), which participated below as an intervenor-defendant. TBN is a religious institution and is classified by the Internal Revenue Service as a "church". TBN refers to its stations as "churches of the air", and its station managers are ordained as "ministers" of the church.

TBN owns twelve commercial television stations as well as 94 low power television permits, and is under common ownership with affiliates owning at least ten other broadcast stations, as well as other media outlets,

including a satellite network that competes with VISN. TBN's satellite network, composed of more than 285 stations, transmits evangelical[8] and charismatic programming fare on a twenty-four hour basis. In contrast to VISN and AIB, TBN engages extensively in on-air fundraising, and its schedule includes numerous programs featuring individual ministers and pastors who engage in fundamentalist and/or

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8 TBN's evangelical approach, as well as its overt interest in the statute at issue, as discussed infra, is exemplified by its January 1993 newsletter to members: "Pray that the new cable TV law, just passed by Congress late last year, will stand the court challenges ... . Pray that doors will continue to burst open around the world to Christian TV as we have seen so dramatically these past few years. The Moslem strongholds of the Middle East and elsewhere are the last remaining areas still closed to the Gospel. We command them to open, in Jesus' name."

evangelical preaching and on-air solicitation of funds for their ministries.

In many of the communities where VISN and/or AIB are carried or seek to be carried on the local cable system, there are one or more local religious broadcast stations, such as WHSG-TV in Monroe, Georgia, an FCC licensee affiliated with TBN, with which the appellant interfaith programmers must compete for both audience and carriage on the Atlanta cable system.

Prior to enactment of the Cable Act, VISN, AIB and the local religious broadcast stations had equal access to the local cable system. The cable operator, after consideration of community needs and interests, determined whether or not to carry VISN, AIB and/or the local religious

broadcast stations on the local cable system, without any interference from any statutory provision or governmental authority. Prior to must-carry, almost without exception, the local religious broadcast stations were excluded from cable.

For example, prior to enactment of the Cable Act, Dimension Cable ("Dimension"), the local cable system operator in San Diego County, California, elected to carry VISN, while removing TBN from carriage. Although Dimension chose to add VISN to its programming because, as its station manager confirmed, it determined that "VISN best meets the needs of the vast majority of our customers," a supporter of TBN thereafter brought a series of thus far unsuccessful legal actions seeking to compel Dimension to return

TBN to its lineup.

Because of their inability to obtain carriage on local cable systems, the local religious broadcast stations and TBN campaigned to influence Congress to enact the Cable Act, and particularly, the must-carry provisions.[9] Following initial Congressional passage of the Cable Act, local religious broadcast stations mobilized their members in support of the bill, running advertisements

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9 For example, noncommercial religious stations are not eligible for must-carry as noncommercial stations under 47 U.S.C. §535(l)(1) because it only applies to stations that can qualify for government grants, and sectarian programming does not qualify under 15 CFR §2301.1. The must-carry rights of commercial stations are more inclusive. Religious broadcasters lobbied Congress with the result that under 47 U.S.C. §534(h)(1) noncommercial religious stations have the enhanced must-carry rights of commercial stations.

requesting their viewers to write to the President and Congress in support of the bill. In a letter to the President shortly before his veto, the religious broadcasters' association, the National Religious Broadcasters, wrote that "[c]arriage of local Christian stations by cable is essential if many stations are to survive" and "a veto of this bill would threaten the future" of such stations.

By reason of must-carry, cable systems will be required to carry virtually every local religious broadcast station, such as TBN's television affiliates in San Diego and Atlanta, which, but for the Cable Act, would not be carried on the local cable systems.

The deleterious impact of must-carry has already been felt by

VISN and AIB. Since local cable systems have limited capacity, they have either been unable or have chosen not to allocate channel space to both the local religious broadcast stations and VISN, AIB and the other religious networks. Thus, as a result of the advent of must-carry, commencing in October, 1992 and continuing thereafter through February, 1993 (at the time the motion for summary judgment was submitted to the Court below), VISN has lost carriage and/or has been advised it will lose carriage by local cable system operators throughout the country,[10] including communities in

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10 In addition to its loss of carriage, by reason of must-carry, VISN is threatened with channel repositioning and tiering of levels of service by the largest nationwide cable systems operator,

(continued)

a Nevada (Las Vegas), Hawaii (Honolulu), California, Washington, Oregon, New Mexico, Utah, Missouri, Kansas, Illinois, West Virginia and Pennsylvania.[11]

As a religious programmer, AIB competes against VISN and against TBN's local outlet, WHSG-TV, from Monroe, Georgia, for space on local cable systems. Prior to the Cable Act, when

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10 (cont) since must-carry requires local broadcasters to be placed in preferred channel. Such repositioning, which has already occurred in Dallas, will cause harm to VISN by moving it to a second tier of channels and placing local religious broadcast stations on the primary tier. This will mean far reduced viewership for VISN/ACTS.

11 Were VISN able to further develop the Record subsequent to the submission of the summary judgment motion to the Court below, it would show that many more cable systems have terminated VISN's carriage or will be denying VISN access to the system solely as a result of must-carry.

carriage of religious programming was in the sole discretion of the cable operator, eleven cable operators picked AIB to be the only religious channel on their systems. However, implementation of must-carry may cause AIB to be dropped to make room for the mandatory carriage of WHSG-TV.

The religious establishment effect is most clearly demonstrated by the fact that TBN and the local religious broadcast stations will, solely by reason of the Cable Act, gain access to cable systems and viewers of cable television in major media markets across the country. According to TBN, it estimates it will gain access to 10 million new households and 36 million new viewers.

THE DECISION BELOW

A divided three-judge district

court upheld the must-carry provisions against appellants' challenge under the Free Exercise and Establishment of Religion Clauses of the First Amendment. The district court applied the test this Court articulated in Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971) and noted that even were it to find that the must-carry provisions disproportionately favor the speech of certain types of religious speakers over others, the provisions do not violate the Establishment Clause. J.S. App. E-27. In dissenting, United States Circuit Judge Stephen F. Williams based his determination that the Cable Act was unconstitutional on its abridgement of the Freedom of Speech and Press Clauses of the First Amendment and did not address the question of whether the must-carry

provisions also violate the Establishment and Free Exercise Clauses. See J.S. App. C-1 to C-22.

The district court rejected appellants' contentions that must-carry violates the Establishment Clause since it has the primary effect of impermissibly advancing the interests of the local religious broadcast stations and favoring those interests over those of VISN and AIB by expanding the local stations' access to cable systems and decreasing carriage for VISN and AIB. Rather, although it implicitly recognized that the mandatory carriage provisions may, in fact, confer certain advantages to some religious groups (such as TBN) over others, the district court characterized these consequences as

"'[i]ncidental' burdens and benefits" J.S. App. C-28.

Finally, the district court disregarded NICC's claim that the must-carry provisions violated the Free Exercise Clause "because they prevent NICC from effectively disseminating its religious message," J.S. App. C-29, concluding that even if NICC's contentions were true, "[a]ny burden imposed on NICC's religious practice" is "merely the incidental effect of a facially religion-neutral law that is generally applicable to all operators, programmers, and broadcasters." J.S. App. C-29.

In his dissent, Judge Williams did not address appellants' arguments. Of significance to the religious arguments set forth below, Judge Williams did, however, recognize the subsidy aspect

of must-carry by pointing out that less intrusive mechanisms such as direct financial subsidies to broadcasters, were available. J.S. App. E-12 to E-13.

THE QUESTIONS ARE SUBSTANTIAL

The questions raised in this appeal involve both the Speech and Press Clauses of the First Amendment as well as the Establishment and Free Exercise Clauses. While the other appellants effectively argue the substantial questions presented by the district court's judgment upholding must-carry under the Speech and Press Clauses, they do not address the other part of the First Amendment relevant to this appeal. Appellants NICC and AIB therefore join in and adopt for purposes of this jurisdictional statement the arguments of the other appellants, since they are applicable

to them as well. However, because appellants NICC and AIB were the only parties to raise below the impact of must-carry on the religion clauses of the First Amendment, it is that aspect of this appeal which is the subject of this jurisdictional statement.

Although the tension between must-carry and the Establishment Clause is not evident from the terms of the statute, this does not mean that its implementation is benign. What appears content-neutral and secular on its face will, in fact, have substantial and far-reaching consequences of government aid to religious broadcasting. Nor will these consequences be incidental or remote to the purpose and effect of the statute. The one broadcasting group that will benefit the most from

this legislation is the local religious off-air broadcast stations.

The constitutional issues raised by must-carry under the religion clauses of the First Amendment are unique, since they involve a form of government aid not previously accorded sectarian institutions. While the government aid is not a direct grant in the form of dollars, it is, in effect, a form of subsidy and it is a far more valuable and beneficial currency because it grants the religious broadcaster something money could not buy -- access to a cable system's television viewing audience in a prime channel location.

A corollary of this grant of privilege to the local religious broadcast station is the resultant denial of access to the cable religious program service. Where the cable

religious program service and local religious broadcaster previously competed for access to the cable system, such equal access has now been sacrificed on the altar of must-carry. Instead, cable program services such as appellants NICC and AIB will be denied access to the cable medium. Cable operators with finite channel capacity will not carry both the local religious broadcaster and the cable religious program service. Having been coerced under must-carry to carry one religious format, cable operators will use the discretion they still retain over the remaining channel capacity and will not carry other religious program services not mandated by Congress. Not only does this deny appellants equal access to the cable television audience, but by granting the local religious

broadcaster a favored status, must-carry has given a preference to one religious speaker over another.

In the context of must-carry, the coercion by act of Congress to require a cable operator to carry a religious station involves questions under both the Free Exercise and Establishment Clauses. Mandating that the operator pick up and carry religious speakers of the local religious broadcasters may be perceived by the television viewing public as an endorsement of such a program by the operator. Clearly, the appearance of government endorsement of religion is prohibited by the Constitution. Coercion of a private citizen to endorse a religious speaker by government fiat, makes it no more acceptable.

While must-carry creates unique problems under the religion clauses, it must nevertheless be scrutinized under the traditional and fundamental notions of constitutional law mandating the separation of Church and State. With must-carry, however, these constitutional imperatives are under serious attack. Government intervention will provide direct and invaluable aid to sectarian institutions to propagate their particular religious message.

1. This Court has long recognized that the Establishment Clause prohibits government aid to sectarian institutions where such aid will "advance the religious mission of the religious institution receiving aid." Bowen v. Kendrick, 487 U.S. 589, 611 (1988). Whether such aid is in the

form of a direct subsidy or some other form of assistance, it remains impermissible. See People of State of Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948), Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 783, n.39 (1973), Hunt v. McNair, 413 U.S. 734 (1973), Tilton v. Richardson, 403 U.S. 672 (1971) and School District of Grand Rapids v. Ball, 473 U.S. 373 (1985). It is in this context that the benefit of must-carry to the local religious broadcaster must be evaluated.

Certainly, it cannot be disputed that where a local religious broadcaster not previously carried on the area's cable system will now be carried solely by reason of the Cable Act, such carriage is tantamount to

government aid. This mandated access to the cable systems by act of Congress is far more valuable to the broadcaster than the direct payment of funds.

The must-carry provisions were intended to provide a subsidy to the local broadcast stations by providing the stations with increased viewership and hence increased advertising revenues.[12] (S. Rep. No. 102-92, 102d Cong., 1st Sess. 59 (1991) reprinted in 1992 U.S.C.C.A.N. 1133, 1192). That this government subsidy was specifically intended to benefit religious stations and was not an incidental benefit is clear from the

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12 That must-carry operates as a financial subsidy was recognized by Judge Williams in his dissent below, in which he observed that must-carry is in the nature of a subsidy and that a less intrusive mechanism would be direct financial subsidy to broadcasters. J.S. App. E-12 to E-13.

Act. Although religious broadcast stations are disqualified from receipt of public broadcast funds under the regulations governing public broadcasting, the Cable Act makes no such distinction and includes all local religious broadcast stations as recipients of its benefits.

The inclusion of local religious broadcast stations in must-carry is not fortuitous, as the larger religious networks lobbied for must-carry and opposed its veto. As the religious broadcasters themselves succinctly stated in opposing President Bush's veto of the Cable Act:

> "Carriage of local Christian stations by cable is essential if many stations are to survive. Thus, veto of this bill could threaten the future of many religious broadcast stations."

The corollary of increased viewership is a far more valuable

currency than even the increased advertising revenues. By providing broader cable coverage and thus increased viewership to religious broadcasters, Congress is aiding the local religious broadcasters in the dissemination and promotion of their religious message. McCollum, 333 U.S. at 212. In fact, Congress expressly recognized that "[a] cable television system which carries the signal of a local religious broadcaster is assisting the broadcaster to increase its viewership..." 47 U.S.C. § 521(a)(15). One of the major religious broadcasters, TBN, has declared that, by reason of must-carry, TBN will be "connected to about ten million new households", and "thirty-six million potential new viewers", and that it will now have "access to about 80% of

the TV households of America." Through government coercion and mandate, the local religious broadcaster will, in fact, be granted a pulpit it could not otherwise obtain.

While all forms of aid to religious institutions are not invalid, aid which directly advances the sectarian institution's religious message, as it would here, is invalid. Zobrest v. Catalina Foothills School District, No. 92-94, 1993 WL 209636, *6 (U.S. 1993); Bowen, 487 U.S. at 609-610. Meek v. Pittinger, 421 U.S. 349, 366 (1975). In Zobrest, this Court reiterated that the state may not grant aid to a religious school, whether in funds or in kind, where the effect of the aid is "that of a direct subsidy to the religious school." 1993 WL 209636 at *6.

This Court has previously permitted

aid to sectarian institutions where it was merely an "attenuated" financial benefit. Thus, it has upheld generalized aid to a religious institution, such as providing it with police and fire protection or keeping its public sidewalks in good repair. Widmar v. Vincent, 454 U.S. 263, 274-275 (1981). So, too, it has upheld a form of aid which provides individuals with government funds to spend at institutions of their choice, including religious institutions, Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986), or the ability of individuals to deduct expenses on their private tax returns. Mueller v. Allen, 463 U.S. 388 (1983). However, the aid given to the religious broadcast stations under must-carry is neither attenuated nor

indirect. Rather, it goes to the very heart of their purpose: to disseminate their message to as large an audience as possible.

The court below sought to avoid this problem by finding that must-carry was a secular statute and that the benefit to the religious broadcaster was merely incidental to such assistance. However, it is submitted that reliance on this narrow interpretation of Lemon, 403 U.S. at 612-613, is misplaced. Nor does this Court's reasoning in Zobrest offer any additional support. This Court has not held that a statute which gives such direct aid to the advancement of a religious mission can be "incidental" or "remote". See Wolman v. Walter, 433 U.S. 229, 250 (1977); Meek, 421 U.S. at 365. Even in Zobrest, the majority did

not just rely on the statute's apparent neutral and secular purpose. Rather, the majority found that the subsidy paid did not violate the Establishment Clause because this "neutral Government program" dispensed aid to the handicapped child and not the sectarian institution. 1993 WL 209636 at *7.

The apparent secular purpose of the must-carry legislation and the fact that on its face it may benefit a broad class of speakers does not mean that its application will not offend the Establishment Clause. In Bowen, 487 U.S. at 601-602, this Court reaffirmed the principle that a court is obligated to look beyond the language of the statute and determine whether its impact will be to advance or endorse sectarian messages and institutions.

This Court has always recognized

that an otherwise valid statute authorizing grants might be challenged on the ground that the award of a grant in a particular case would be impermissible, where the recipient of the grant does, in fact, possess sectarian characteristics. Bowen, 487 U.S. at 601; Hunt, 413 U.S. at 743; Tilton, 403 U.S. at 682. Further, where a statute is challenged with respect to a particular application, this Court has narrowed the focus of its inquiry as to primary effect and has stated that it must look only at the particular application at issue -- here, the mandated carriage of religious broadcast stations. Hunt, 413 U.S. at 743.

Certainly, the unique aspects presented by the mandatory carriage granted the religious broadcaster under

must-carry requires further review by this Court. It is not enough that the statute is apparently neutral on its face and is merely providing another medium for an FCC off-air broadcast licensee. The mandatory aspect of must-carry creates problems not previously encountered and changes the licensee into a government-supported entity with a right of access imposed by law. Where that entity is a religious broadcaster, serious questions are raised under the religion clauses of the First Amendment.

2. Must carry has created new issues under the Establishment and Free Exercise Clauses with regard to access of religious speakers to the cable viewing public. Because cable's capacity is limited, not everyone will have the opportunity to speak.

Nonetheless, Congress has defined a particular favored class, a class which specifically includes local religious broadcast stations, and has definitively mandated that the members of that class must be permitted to speak on cable. Because cable operators do not wish to carry multiple religious channels, a religious off-air broadcaster will now have access to the cable viewing audience, to the exclusion of the religious cable program service. Thus, where the local religious broadcasters are predominantly of one particular religious persuasion, the preference granted these broadcasters over the cable program service is all the more invidious.

The record is already clear that where a cable operator is required to

carry a local religious broadcast station, it will drop or refuse to add the religious cable program service. AIB believed that once must-carry was fully implemented, it would have no access to cable systems which will be required to carry the local TBN stations. So, too, NICC has been informed that where the local religious broadcast station must be carried, VISN will not be carried or will otherwise be placed in an inferior channel position.[13]

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13 The evidence with regard to these issues has only been partially developed since the summary judgment motion by appellees cut off all discovery and any evidentiary hearings. If this Court were to reverse the judgment below and remand the case, the record would be more fully developed. Appellants are prepared to document further this adverse impact, since they continue to be dropped from cable systems as religious broadcast stations are added.

The reason for this adverse impact on AIB and NICC is not merely fortuitous or unintended. Cable operators will only carry a limited amount of religious programming. Certainly, commercial secular programming has the greater viewing audience and will get preferential space over either the religious off-air broadcaster, AIB or VISN. Where the religious off-air broadcaster has achieved access by operation of law, the religious cable program service not protected by law will lose out. This has already happened in Honolulu, California and Washington, and will continue to occur throughout the country as hundreds of religious off-air broadcast stations are added to their local cable system.

This Court has always protected the right of equal access to public forums. Widmar, 454 U.S. at 269 and more recently in Lambs Chapel v. Center Moriches Union Free School District, 1993 WL 187864, *3 (U.S.N.Y. 1993). Religious speakers are guaranteed the same rights of access to public forums as secular speakers. It remains fundamental constitutional law that access controlled by the government cannot be based upon the type of speech involved. Yet must-carry will alter these fundamental principles. Having changed how cable operators select their programming, must-carry will change the means of access for the benefit of the local religious broadcaster and to the detriment of the cable programmer. As a result, the religious message of the local

religious broadcaster will be heard, and appellants' voices may be permanently silenced.

The impact of must-carry is to change an essentially privately operated cable system into a public forum. See PruneYard Shopping Center v. Robins, 447 U.S. 74, 85-87 (1980). The court below relied expressly on PruneYard for the proposition that private property may become a public forum. J.S. App. C-16, C-20, n. 24. However, the access to this new public forum is not equal for all speakers. Local religious broadcasters have guaranteed channel allocation in a preferred location, and all other cable programmers are left to seek a place on the remaining channel space. The cable operator will thus have discretion over fewer available channels, and its

choices will be circumscribed in conjunction with the type of broadcast stations it has been required to carry. With only limited channels available for religious programming, the local religious broadcast station will be given access as a matter of law, and other religious speakers such as VISN and AIB will not. Congress has made the choice, not the cable operator.

The problem of lack of equal access becomes even more pronounced because of the differing sectarian messages involved. The record already shows that the religious off-air broadcasters are primarily controlled by particular Christian evangelical sects. They offer a specific type of message. In contrast, VISN and AIB offer not a narrow sectarian message but present diverse religious views from many

different faith perspectives. As a result of must-carry, however, the latter may now have no television viewing audience since their only access to the public is through the cable system, and the former will have 100% of the television viewing audience -- i.e., off-air and cable. While such an occurrence might not have been envisioned by Congress, its impact is no less invidious.

3. The fact that Congress, by virtue of must-carry, has attempted to restrict the editorial discretion of cable operators is central to the arguments of the other appellants, and appellants NICC and AIB join in these arguments. However, these other appellants only argue the issues from a Free Speech perspective. While the Free Speech question is of central

concern to the validity of must-carry, it does not focus on the fundamental religious speech issues which are present as well.

Clearly, must-carry requires cable operators to carry religious speech whether they want to or not, and to carry specific religious speakers, yet this Court has consistently held that it is impermissible for the government to coerce a citizen to convey religious speech. Wooley v. Maynard, 430 U.S. 705, 713 (1977); County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 576 (1989). As Justice Kennedy observed in his separate opinion in County of Allegheny, this Court has "without exception... invalidated actions that further the interests of religion

through the coercive power of government." 492 U.S. at 660.

Nothing could be more coercive or compelling than the must-carry provisions, in that they require cable operators under penalty of law to deliver to their subscribers religious messages from religious speakers. Cable owners clearly object to these messages and speakers.

Governmental coercion of the cable operator to carry religious programming is all the more egregious because it may be perceived by the viewing public as an endorsement of such programming by the cable owner. When government sponsorship of a religious message may be perceived by the listener or viewer, the Court has refused to permit it to stand. County of Allegheny, 492 U.S. at 592-594; Lee v. Weisman, ____

U.S. _____, 112 S. Ct. 2649 (1992). This doctrine is applicable to the cable operator who is required to carry a religious speaker by operation of law. The cable operator may be perceived by the viewing audience as having endorsed the particular religious program, since it is being carried on its cable system. If such carriage of this program is due to government mandate, it is an impermissible imposition upon the rights of the cable operator.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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